STATE OF MICHIGAN

COURT OF APPEALS

MARIA DECKER,

Plaintiff-Appellant,

v

KENNETH JAMES KIGER,

Defendant-Appellee,

and

DETROIT STEEL TREATING CO.,

Defendant.

UNPUBLISHED
July 13, 2010

No. 290606
Oakland Circuit Court
LC No. 2008-090222-NI

MARIA DECKER,

Plaintiff-Appellant,

v

KENNETH JAMES KIGER, a/k/a ENTERPRISE LEASING COMPANY,

Defendant-Appellee,

and

MIRAC, INC., a/k/a ENTERPRISE LEASING, ENTERPRISE LEASING COMPANY OF DETROIT, a/k/a ENTERPRISE LEASING, and ENTERPRISE LEASING OF INDIANAPOLIS, INC.,

Defendants.

No. 291407
Oakland Circuit Court
LC No. 2007-082803-NI

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

In Docket No. 290606, plaintiff appeals the trial court's orders granting defendant Kenneth James Kiger's motion for summary disposition and denying plaintiff's motion for reconsideration. In Docket No. 291407, plaintiff appeals the court's orders closing the case and denying her motion for reconsideration. These cases were consolidated on September 9, 2009,[1] and we affirm.

I. BACKGROUND

This case arises out of plaintiff's attempts to recover no-fault benefits and damages for injuries she sustained in an automobile accident with defendant Kenneth James Kiger on May 12, 2004. At the time of the accident, Kiger was driving a vehicle leased by his employer, defendant Detroit Steel, from defendant Enterprise Leasing Company of Detroit. Out of this single accident arose three separate, but related lawsuits in 2005, 2007, and 2008. The orders pertaining to the 2007 and 2008 cases underlie this appeal.

A. 2005 CASE

Following the accident, plaintiff initially filed suit on May 4, 2005 alleging negligence against Kiger and seeking first-party personal injury protection (PIP) benefits from Kiger's insurer, State Farm Mutual Automobile Insurance Company. The parties subsequently stipulated to dismissal without prejudice of plaintiff's claim against Kiger, and an order was entered to this effect on October 21, 2005. As for State Farm, on June 6, 2006, the court dismissed with prejudice plaintiff's PIP claims accrued before March 1, 2005, but dismissed without prejudice plaintiff's PIP claims accrued after March 1, 2005.

B. 2007 CASE

On May 9, 2007, plaintiff filed a second suit again alleging negligence against Kiger, and additionally alleging that defendants Mirac, Enterprise Leasing, Enterprise Leasing Company of Detroit and Enterprise Leasing of Indianapolis (hereinafter "Enterprise") were liable under the Owners' Civil Liability Statute (OCLS), MCL 257.401. On June 1, 2007, an attorney from Hutchinson & Associates, P.C.–the same firm that represented Kiger in the 2005 lawsuit–acknowledged to plaintiff's counsel the firm's representation of defendants in the 2007 case and indicated that responsive pleadings were forthcoming pending confirmation of service of process on its clients.

In due course, Enterprise was served with process. However, the process server averred he was unable to serve Kiger after making several attempts at his last-known home address (6653 Doyon Street in Waterford) and last-known employer, Detroit Steel. The server ultimately concluded Kiger was attempting to avoid service after attaching a copy of the summons and

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[1] *Decker v Kiger*, unpublished order of the Court of Appeals, entered September 9, 2009 (Docket Nos. 290606 & 291407).

complaint to the door of 6653 Doyon. However, no proof of service was filed and the summons expired August 8, 2007.

Hutchinson subsequently filed responsive pleadings on behalf of Enterprise only, and moved for summary disposition on the grounds that Enterprise was not an "owner" under the OCLS where the lease period of its vehicle was greater than 30 days. Agreeing with Enterprise, the court granted this motion on June 19, 2008.

C. 2008 CASE

In the mean time, plaintiff filed a third suit on March 19, 2008–this time asserting negligence against Detroit Steel, in addition to Kiger, since Detroit Steel was the "owner" of the vehicle Kiger was operating. Detroit Steel and Kiger answered and asserted the affirmative defense that the statute of limitations barred plaintiff's claim under MCL 600.5805(10).

This same argument was then presented in separate motions for summary disposition under MCR 2.116(C)(7) (statute of limitations). Plaintiff, responding to Kiger's motion, maintained that regardless of any errors in service, Kiger was in fact informed of the 2007 lawsuit by virtue of Hutchinson's indication it would represent all defendants in the 2007 action, Hutchinson's subsequent appearances for defendants, and because it appeared Kiger avoided service. Kiger replied that service failed entirely where he had moved from the Doyon address in 2005 and his mother had sold the house in 2007, plaintiff failed to conduct adequate inquiries that would have located his new address, and any prior representation by Hutchinson was irrelevant to Kiger's knowledge of the 2007 lawsuit.

D. ORDERS OF THE 2007 AND 2008 CASES UNDERLYING THIS APPEAL

Following discovery and a motion hearing, the court took the matter under advisement. Before an opinion and ordered was issued, however, plaintiff filed a motion to amend her complaint in the 2007 lawsuit to add Detroit Steel to correct the "misnomer" that Enterprise was the vehicle "owner." On October 24, 2008, the court issued two opinions concerning both the 2008 and 2007 cases.

1. 2008 ORDER

Regarding the 2008 case, the court opined that the summons and complaint were never served on Kiger since he had moved from his mother's house and that Hutchinson's letter to plaintiff did not constitute an appearance for Kiger where the letter only contemplated future appearances and no attorney, in fact, answered or appeared for Kiger. Consequently, the court concluded the statute of limitations was not tolled and, therefore, plaintiff's 2008 suit against Kiger was time-barred.[2]

[2] Plaintiff stipulated to Detroit Steel's dismissal with prejudice from the 2008 case on December 4, 2008.

2. 2007 ORDER

With respect to plaintiff's motion to amend the complaint in the 2007 case, the court concluded that plaintiff's motion was merely an attempt to toll the statute of limitations retroactively as to Detroit Steel from the initial filing of the 2005 action, and found the misnomer doctrine inapplicable where plaintiff's motion sought an entire change in parties.

Additionally, after observing that the order granting Enterprise's motion for summary disposition effectively dismissed the Enterprise defendants from the 2007 case on the order's date of entry (June 19, 2008), the court entered an order on November 21, 2008, closing the 2007 case. Since the clerk had not previously closed the 2007 case, that order was made effective on the date of entry rather than *nunc pro tunc* to protect the parties' appellate rights.

3. RECONSIDERATION

Plaintiff subsequently requested reconsideration of the 2008 case order granting Kiger's motion for summary disposition on the grounds that Hutchinson's actions were sufficient to constitute a "general appearance" for Kiger. Alternatively, plaintiff urged the court to reinstate her 2005 claim against Kiger since–based on Kiger's deposition transcript, which was unavailable prior to the filing of this motion–Hutchinson had no actual authority to answer or stipulate to a dismissal on behalf of Kiger, and the statute of limitations therefore remained tolled from the filing of that action. Plaintiff also filed a motion for reconsideration of the order closing the 2007 case, again seeking reinstatement of the 2005 case where Kiger was aware of the suit and was represented by Hutchinson.

The court denied both motions. Concerning the first motion (for the 2008 case), on February 13, 2009, the court held that Hutchinson made no appearance for Kiger where Hutchinson only contemplated a future appearance for Kiger and every filing indicated Hutchinson's representation of Enterprise only. The court also declined to reinstate the 2005 case where Hutchinson had apparent authority to represent Kiger and, in any event, plaintiff was bound by her stipulation to dismiss that case. Through this order, the court expressly closed the 2008 case.

Concerning the second motion for reconsideration (of the 2007 case) the court ruled on March 24, 2009, that dismissal of Kiger from the 2007 case was appropriate where there was no evidence that Kiger was informed of the 2007 case, Hutchinson filed an answer only for Enterprise, and plaintiff's filings failed to indicate Kiger was represented by Hutchinson. The court also declined to reinstate the 2005 case for the reasons previously stated.[3] The instant appeals ensued.[4]

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[3] The court entered this identical order for the 2005 case on March 24, 2009.

[4] Plaintiff also appealed the March 24, 2009, order as entered in the 2005 case. However, this Court dismissed the appeal for lack of jurisdiction, *Decker v Kiger*, unpublished order of the Court of Appeals, entered April 28, 2009 (Docket No. 291408), and plaintiff did not file a (continued…)

II. ANALYSIS

In both appeals, plaintiff seeks relief on identical grounds–namely, that this Court reverse the relevant orders since service did not completely fail and Kiger submitted to the trial court's jurisdiction,[5] or alternatively, that the 2005 action should be reinstated against Kiger. Therefore, while proceeding forward, we address the arguments from each appeal jointly.[6]

A. STANDARD OF REVIEW

Decisions on summary disposition motions under MCR 2.116(C)(7) (statute of limitations bars the claim) are reviewed de novo. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). "In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008). The proper interpretation of statutes and court rules as well as the question of whether a trial court has personal jurisdiction over a party are reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Kuznar*, 481 Mich at 176; *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004). To the extent the court made factual findings, our review is for clear error. *Markillie v Livingston Co Bd of Rd Comm'rs*, 210 Mich App 16, 22; 532 NW2d 878 (1995). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. To the extent plaintiff's claims relate to the court's denial of her motions for reconsideration, our review is for an abuse of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658; 617 NW2d 368 (2000).

B. SERVICE OF PROCESS

"Service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986); MCR 2.105(J)(1). Thus, "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time

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delayed application for leave to appeal under MCR 7.205(F).

[5] Although plaintiff's argument in Docket No. 290606 challenges the court's finding that the statute of limitations was not tolled as to Kiger, resolution of this issue hinges on whether the court properly acquired jurisdiction over Kiger, MCL 600.5856(b), and consequently, on whether Kiger was properly served with process.

[6] Kiger contests this Court's jurisdiction over plaintiff's appeal in Docket No. 291407, claiming her appeal was untimely where the June 19, 2008, order was effectively the final order in the 2007 case. However, the court indicated there was confusion over the finality of that order and consequently entered an opinion and order closing the case on November 20, 2008. Plaintiff's timely motion for reconsideration of that order was denied on March 24, 2009. Therefore, having filed her appeal from the order denying reconsideration on April 9, 2009–well within the 21-day window of MCR 7.204(A)(1)–our jurisdiction is not time-barred.

provided in these rules for service." MCR 2.105(J)(3). That rule is applicable for 91 days after the complaint is filed, at which time, the summons expires, MCR 2.102(D), and "the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction[,]" MCR 2.102(E)(1). However, where there is a complete failure of service of process–as distinguished from improper service of process–MCR 2.105(J)(3) is inapplicable and dismissal is appropriate upon expiration of the summons. *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991).

Plaintiff maintains that dismissal of the 2007 action against Kiger was improper where the service of process was sufficient to provide Kiger actual notice of the 2007 lawsuit against him. In support of this contention, plaintiff first cites the process server's attempts to serve Kiger at the Doyon address as evidence that Kiger had actual notice of the suit. And while plaintiff is correct that actual receipt of the summons and complaint within the permitted time precludes dismissal of an action on the grounds that the manner of service contravenes the rules, *id*., her argument is not born out by the evidence.

Indeed, not only did the process server admit that he attached the summons and complaint to the Doyon address on August 3, 2007, despite being informed that Kiger no longer lived at that address, but also Kiger's uncontroverted affidavit and deposition reveal that Kiger did not receive notice–let alone service of process–of the 2007 action. Specifically, Kiger averred that he had moved from his mother's house at the Doyon address in 2005, had formally changed his mailing address in July 2006, and that his mother had sold and moved from that house in January 2007. Kiger also did not know who lived in the house after his mother moved. Hence, the undisputed evidence showed that neither Kiger nor anyone in his family had resided in the house on Doyon for nearly eight months before service was attempted there. In light of this, we cannot find the court's finding that Kiger "never was informed of the 2007 case" clearly erroneous, *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 289-290; 731 NW2d 29 (2007).

Nor do we find that Hutchinson's receipt of the complaint was sufficient to show that Kiger was served with process. As this Court held in *Holliday*, 189 Mich App at 425-426, service of the complaint alone without a summons constitutes a complete failure of service of process. In any event, even if the summons were served on Hutchinson, as plaintiff argues without citation to the record, such service was insufficient to inform Kiger of the action where Kiger indicated he had no knowledge of the 2007 suit and that firm did not represent Kiger in the 2007 action.

On this note, even though Hutchinson's initial letter to plaintiff's counsel stated that "[w]e have been retained to represent the Defendants in this case . . . [and] will be filing responsive pleadings as soon as we can confirm service[,]" that letter also made any appearance contingent upon confirmation of service of process from Hutchinson's clients. When this is considered in conjunction with the fact that Hutchinson subsequently filed responsive pleadings on behalf of Enterprise only (and none of plaintiff's motions indicated that Kiger was represented by counsel for Enterprise), we cannot conclude that service on Hutchinson constituted service on Kiger. And plaintiff's assertion that service on Hutchinson was sufficient contradicts the fact that plaintiff initiated her attempts to serve Kiger, individually, nearly a week after serving Hutchinson, and continued her attempt to serve Kiger for a month after Hutchinson filed an answer and affirmative defenses on behalf of Enterprise only.

Plaintiff cites *Michigan Ed Assoc v North Dearborn Heights Sch Dist*, 169 Mich App 39, 45; 425 NW2d 503 (1988); *Hill*, 155 Mich App at 613; and *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 674; 413 NW2d 474 (1987), in support of her contention that improper service of process on a party's attorney, under certain circumstances, may be sufficient to avoid dismissal. In those cases, however, the parties either had actual notice independent of counsel or a representative, *Michigan Ed Assoc*, 169 Mich App at 45; *Hill*, 155 Mich App at 613, or counsel appeared *expressly* on behalf of the defendant, *Brunner*, 162 Mich App at 674. Unlike those cases, here, there is no evidence that Kiger had actual notice of the suit after Hutchinson was served. Moreover, as previously noted, Hutchinson entered an appearance expressly on behalf of Enterprise only. In view of this, we conclude there was a complete failure of service of process. *Holliday*, 189 Mich App at 425.

Plaintiff counters that even if she failed to serve Kiger, dismissal was not appropriate where the Hutchinson letter constituted a "general appearance" thereby submitting Kiger to the court's jurisdiction under MCR 2.102(E)(1). We disagree. "A party who enters a general appearance and contests a cause of action on the merits submits to the jurisdiction of the court and waives service of process objections." *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985).[7] Under MCR 2.117(B), an attorney may appear on behalf of a party "by an act indicating that the attorney represents a party in the action." An act by an attorney is sufficient to support the inference that it is an appearance if there exists "(1) knowledge of the pending proceedings and (2) an intention to appear." *Penny v ABA Pharmaceutical Co* (*On Remand*), 203 Mich App 178, 182; 511 NW2d 896 (1993), overruled in part on other grounds *Al-Shimmari*, 477 Mich at 293.

Here, it cannot be disputed that the Hutchinson letter revealed knowledge of the proceedings. However, it is dubious whether the Hutchinson letter indicated an intent to appear where the letter twice made any appearance contingent on proper service upon defendants. Specifically, the letter provided, "We will be filing responsive pleadings *as soon as we can confirm service*," and then added, "*if I can confirm service from the clients*, we will start filing appearances." (Emphasis supplied.) At best, such statements reveal a possible intention to appear.

In any event, even if the letter could be construed as an act indicating an appearance under MCR 2.117(B)(1), it is undisputed that Kiger did not authorize the appearance. Indeed, on this very point, Kiger expressly denied that he had retained Hutchinson to represent him in the 2007 action. And "an unauthorized appearance is ineffective for any purpose." *Wright v Estate of Treichel*, 36 Mich App 33, 38; 193 NW2d 394 (1971).[8] Thus, Kiger could not have submitted to the jurisdiction of the court.

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[7] This general rule does not apply when challenging service of process under MCR 2.116(D)(1). *Al-Shimmari*, 477 Mich at 293.

[8] That Hutchinson in representing Enterprise put forward defenses that would have overlapped with Kiger's defense had the summons not expired in the 2007 case does not *ipso facto* mean that Hutchinson represented Kiger. This is especially true where Kiger expressly denied that he

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In light of the foregoing, we conclude that there was a complete failure of service of process on Kiger, and the trial court, therefore, properly determined that Kiger was dismissed from the 2007 action upon expiration of the summons in Docket No. 291407.

C. STATUTE OF LIMITATIONS

By the same token, we reject plaintiff's challenge in Docket No. 290606 to the court's finding that the statute of limitations was not tolled and, therefore, expired before plaintiff's 2008 negligence claim was filed against Kiger.

MCL 600.5805 governs personal injury actions. While the statute provides a three-year statute of limitations accruing from the time of injury, it also allows for tolling of the three-year period at the time the complaint is filed if process is timely served on the defendant or, alternatively, at the time jurisdiction is otherwise acquired over the defendant. MCL 600.5805(10); MCL 600.5856(a) and (b). Since there was a complete failure of service of process on Kiger and Kiger did not otherwise submit to the court's jurisdiction, the tolling provisions of MCL 600.5856 are inapplicable. Thus, the three-year statute of limitations barred plaintiff's 2008 claim where plaintiff incurred her injury on May 12, 2004, but did not file her complaint against Kiger until March 19, 2008.[9] Dismissal of plaintiff's 2008 claim was appropriate.

D. 2005 CASE

Alternatively, plaintiff requests that because Hutchinson had no authority to represent plaintiff in the 2005 case, the 2005 case should be reinstated against Kiger, or the statute of limitations should be tolled from the time Kiger was served with the 2005 complaint and summons. Under either scenario, however, plaintiff's challenge hinges on resolution of an issue wholly related to the 2005 case.

Notably, the court's 2007 order denying reconsideration, which plaintiff contests as it relates to the 2005 case, was also entered in the 2005 case on March 24, 2009. And, although plaintiff already appealed from that order as entered in the 2005 case, that appeal was dismissed for lack of jurisdiction, and plaintiff failed to file a delayed application for leave to appeal that order as required under MCR 7.205(F). *Decker v Kiger*, unpublished order of the Court of Appeals, entered April 28, 2009 (Docket No. 291408).

Thus, although this Court has jurisdiction over the instant appeals insofar as they relate to the 2007 and 2008 cases, plaintiff's attack on the propriety of the order denying reconsideration

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was aware of the 2007 allegations against him or that Hutchinson represented him. Furthermore, while Hutchinson made appearances for Kiger in the 2005 case without confirming whether process was served on Kiger, there was not a complete failure of service where Kiger was properly served with the summons in that case.

[9] Even tacking the tolling period from the 2005 case from the date that complaint was filed (May 4, 200) until Kiger was dismissed without prejudice (October 25, 2005) is insufficient to bring the 2008 case within the three-year period.

of Kiger's dismissal from the 2005 case (and the consequent relief that the case should be reinstated) is an impermissible collateral attack properly suited to a delayed application for leave to appeal in the 2005 case.[10] See *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995), quoting *People v Ingram*, 439 Mich 288, 291 n 1; 484 NW2d 241 (1992) ("a collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal"); see also, *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) ("Defendant's failure to file an appeal from the original judgment . . . pursuant to MCR 7.205(A) or (F), precludes a collateral attack on the merits of that decision."). For this reason, we decline to address plaintiff's request to reinstate the 2005 case in Docket Nos. 290606 and 291407.

Similarly, whether the statute of limitations should be tolled in the 2008 case is wholly dependent upon whether Kiger's dismissal was proper in the 2005 case. And although the trial court addressed whether Kiger was properly dismissed from the 2005 case in denying reconsideration, we do not have authority to decide issues arising out of a different lower court case than the one before us on appeal. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

In any event, despite Kiger's testimony that he was unaware that he had legal representation in the 2005 action or that an attorney from Hutchinson had stipulated to dismissal of the 2005 case on his behalf, it is clear that Kiger was properly served with the 2005 summons and complaint and that his employer, after receiving those documents at Kiger's direction, indicated that the matter would be referred to the employer's lawyer. Given that it is undisputed that Kiger's employer was required to insure the vehicle and Kiger was aware the matter would be referred to counsel, we would be hard pressed to find that plaintiff had any "reason to believe that the attorney was without authority to negotiate a settlement." *Nelson v Consumers Power Co*, 198 Mich App 82, 90; 497 NW2d 205 (1993) (quotation and citation omitted).

Notwithstanding, even assuming that counsel's representation of Kiger in 2005 was dubious and somehow plaintiff would have standing to challenge the relationship between Kiger and his lawyer, plaintiff has cited no authority contravening the rule that "[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 529; 695 NW2d 508 (2004) (quotation marks and citation omitted). The trial court did not abuse its discretion in denying plaintiff's motions for reconsideration as they related to the 2005 case.

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[10] Kiger maintains that we lack jurisdiction over this aspect of plaintiff's appeal because the one-year time limit under MCR 2.612(C)(2) to seek relief from judgment as regards the 2005 order of October 21, 2005, has expired. This argument, however, neglects the fact that plaintiff's challenge relates to the order denying reconsideration as entered in the 2005 case on March 24, 2009, and is consequently unavailing.

Affirmed.

Defendant Kiger may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher